IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 15, 2001

STATE OF TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES v. J.S., ET AL.

Appeal from the Chancery Court for Maury County
No. 00-151 Robert L. Holloway, Jr., Chancellor

No. M2000-03212-COA-R3-JV - Filed October 25, 2001

This case involves a petition for termination of parental rights brought by the Tennessee Department of Children's Services ("DCS"). Following a bench trial, the court below terminated the parental rights of J.S. ("Mother") and T.P. ("Father") with respect to their minor child, A.R.P. (DOB: November 5, 1995), finding, by clear and convincing evidence, (1) that both Mother and Father exhibited a wanton disregard for the child such as to constitute abandonment under T.C.A. § 36-1-102(1)(A)(iv), and (2) that termination is in the child's best interest. Mother and Father appeal separately, arguing that the trial court erred in terminating their parental rights because clear and convincing evidence of abandonment was not shown at trial. They also contend that the record does not contain clear and convincing evidence that termination is in the best interest of the child. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and D. MICHAEL SWINEY, J., joined.

William C. Barnes, Jr., Columbia, Tennessee, for the appellant, J.S.

Jason A. Golden, Columbia, Tennessee, for the appellant, T.P.

Paul G. Summers, Attorney General and Reporter, and Elizabeth C. Driver, Assistant Attorney General, for the appellee, State of Tennessee Department of Children's Services.

OPINION

I. *Facts*

On March 23, 1996, six-month old A.R.P. was taken into the custody of DCS. He had been left at the home of a non-relative because Mother had been arrested and Father could not be located. On July 22, 1997, an adjudicatory hearing was held, and it was ordered that A.R.P. should remain in the custody of DCS. At the time of the trial below, on October 6, 2000, nearly four and one-half years after A.R.P. had been removed from Mother's care, he was still in state custody.

In March, 2000, DCS filed a petition to terminate the parental rights of both Mother and Father claiming, among other things, that abandonment of A.R.P. by his parents pursuant to T.C.A. § 36-1-102(1)(A)(iv) had occurred; specifically that the parents' drug use and criminal activity prior to their incarceration showed a wanton disregard for A.R.P.'s welfare. At the time of trial on October 6, 2000, Mother was incarcerated, awaiting a release date sometime in January, 2001, and Father had been released from prison in July, 2000, just eight weeks earlier.

Testimony at trial revealed that both Mother and Father have extensive criminal histories, and both are admitted drug addicts. Beginning in 1994, Father was convicted of aggravated robbery and placed on supervised probation for six years. In 1997, his probation was revoked when he was found guilty of aggravated assault and was sentenced to three years in prison to run consecutively with his six-year sentence. Mother's criminal history also dates back to 1994. From 1994 until 1996, she was placed on intensive supervised probation for charges of reckless endangerment and driving under the influence. In 1996, her probation was revoked and she was ordered to undergo drug rehabilitation in a halfway house. In 1997, she was charged with nine counts of passing worthless checks, and she was imprisoned for aggravated robbery and facilitation of robbery. According to her testimony, most of these crimes were committed to support her addiction to crack cocaine. In April, 1999, she was released from prison and placed on parole. However, after only four months, she tested positive for cocaine and was charged with disorderly conduct and vandalism, resulting in a violation of her parole and, ultimately, re-incarceration in July, 1999.

Following a bench trial, the court entered an order on October 19, 2000, granting DCS's petition, finding clear and convincing evidence that termination of both parents' parental rights was justified. The court found that the actions of both Mother and Father during the first five years of their child's life "demonstrated a wanton disregard for their child's welfare," such as to constitute abandonment under T.C.A. § 36-1-102 (1)(A)(iv). Furthermore, the court found that termination of parental rights was in the child's best interest, according to the criteria found in T.C.A. § 36-1-113 (i), and that this was shown by clear and convincing evidence.

On appeal, both parents raise the sole issue of whether the trial court committed error when it terminated their parental rights on the basis of abandonment.

II. *Standard of Review*

In this non-jury case, our review is *de novo* upon the record of the proceedings below; but the record comes to us with a presumption of correctness as to the trial court's factual determinations unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Wright v. City of Knoxville***, 898 S.W.2d 177, 181 (Tenn. 1995); ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law, however, are given no such presumption. ***Campbell v. Florida Steel Corp.***, 919 S.W.2d 26, 35 (Tenn. 1996); ***Presley v. Bennett***, 860 S.W.2d 857, 859 (Tenn. 1993).

III. *Law*

It is well-settled that "parents have a fundamental right to the care, custody, and control of their children." ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing ***Stanley v. Illinois***, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972)). However, this right is not absolute and may be terminated if there is clear and convincing evidence justifying termination under the pertinent statute. ***Santosky v. Kramer***, 455 U.S. 745, 769, 102 S.Ct. 1388, 1403, 71 L.Ed.2d 599 (1982). Clear and convincing evidence is evidence which "eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence." ***O'Daniel v. Messier***, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995).

In the instant case, the trial court terminated the parental rights of Mother and Father based upon the following statutory authority:

T.C.A. § 36-1-113 (2000)

> (a) The chancery and circuit courts shall have concurrent jurisdiction with the juvenile court to terminate parental or guardianship rights to a child in a separate proceeding, or as a part of the adoption proceeding by utilizing any grounds for termination of parental or guardianship rights permitted in this part or in title 37, chapter 1, part 1 and title 37, chapter 2, part 4.
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> * * *
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> (c) Termination of parental or guardianship rights must be based upon:
> (1) A finding by the court by clear and convincing evidence that the grounds for termination or parental or guardianship rights have been established; and
> (2) That termination of the parent's or guardian's rights is in the best interests of the child.

* * *

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:
(1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred ....

T.C.A. § 36-1-102 (2000)

As used in this part, unless the context otherwise requires:
(1)(A) "Abandonment" means, for purposes of terminating the parental or guardian rights of parent(s) or guardian(s) of a child to that child in order to make that child available for adoption, that:

* * *

(iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, or the parent or guardian has engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child.

IV. *Discussion*

After reviewing the evidence presented in this case, we find that clear and convincing evidence exists to support the trial court's termination of Mother's and Father's parental rights based upon the court's finding of abandonment. Because both Mother and Father were incarcerated for four months immediately preceding the filing of the petition to terminate their parental rights on March 10, 2000, the court relied upon the statutory definition of abandonment found in T.C.A. § 36-1-102(1)(A)(iv).

In this case, the evidence presented at trial shows that Mother was in and out of jail and drug treatment facilities from 1994, until she was incarcerated in November, 1997. Furthermore, she was paroled in April, 1999, re-incarcerated in July, 1999, and, at the time of trial, was scheduled for release in January, 2001. The evidence also shows that Father was incarcerated from April 24, 1997, until July 28, 2000. Thus, since both Mother and Father were incarcerated during all of the four months immediately preceding the institution of the action to terminate their parental rights, they both satisfy the first prong of T.C.A. § 36-1-102 (1)(A)(iv).

After satisfying the first prong of the statute, a parent is subject to having his or her parental rights terminated if he or she willfully fails to visit or support the child for four months prior to incarceration, *or* if his or her conduct prior to incarceration exhibits a wanton disregard for the child's welfare. *See* T.C.A. § 36-1-102(1)(A)(iv).

Like the trial court, we conclude that the criminal activity and drug abuse of both Mother and Father during the four months prior to incarceration, and for many months before incarceration, constitute a wanton disregard for the welfare of their child. This conclusion is supported by decisions of this Court finding that a parent's drug abuse and related criminal activity demonstrates a parent's wanton disregard for their child. *See* ***In re C.W.W.***, 37 S.W.3d 467, 475 (Tenn. Ct. App. 2000) *perm. app. denied* November 20, 2000. In ***In re C.W.W.***, this Court discussed another case reaching this same conclusion:

> In *Department of Children's Services v. Wiley*, No. 03A01-9903-JV-0091, 1999 WL 1068726, at *7 (Tenn. Ct. App. Nov. 24, 1999), *perm. app. denied* (Tenn. Apr. 24, 2000), for example, the father "admitted that he was addicted to cocaine and that his need for money to support his habit led him to commit several burglaries and thefts" that resulted in his incarceration. This court held that the Father's conduct demonstrated his wanton disregard for the welfare of his children." *See Wiley*, 1999 WL 1068726, at *7.

In re C.W.W., 37 S.W.3d at 475; *see also* ***In re Shipley***, C/A No. 03A01-9611-JV-00369, 1997 WL 596281, at *5 (Tenn. Ct. App. E.S., filed September 29, 1997) (finding father's drug and alcohol problems and criminal activity showed a wanton disregard for child).

In the instant case, both Mother and Father have extensive criminal histories and admitted drug addictions. Like the father in ***Wiley***, Mother testified that most of her crimes were committed to support her addiction to crack cocaine. Father admitted using illegal drugs prior to his incarceration for robbery and aggravated assault. He also testified that his drug use resulted in a violation of his probation in 1996. Furthermore, Father testified that his drug use after A.R.P. was born was neglectful because he knew that drug use was wrong.

Before terminating a parent's rights to his or her child, the trial court must make two findings. First, the court must find that one of the grounds for termination has been established by clear and convincing evidence. *See* T.C.A. § 36-1-113(c)(1). In the instant case, the trial court found, and we agree, that there was clear and convincing evidence of abandonment, on the basis of a wanton disregard for the child. Once the court has made this finding, the court must also find that termination of parental rights is in the best interest of the child. *See* T.C.A. § 36-1-113 (c)(2).

When making a best interest determination, the trial court must consider the following factors:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

T.C.A. § 36-1-113 (i) (2000).

In concluding that termination of Mother and Father's parental rights was in the child's best interest, the trial court relied upon factors (3), (4), (5), (7), and (9). The trial court found:

> Because of the criminal problems neither parent has maintained regular visitation or contact with the child. A meaningful relationship has not been established. Changing the caretakers and physical environment of the child at this time would likely have a significant and negative emotional and physiological effect. There has been a history of criminal activity by both parents. There has been alcohol and controlled substance abuse by both parents. Neither parent has financially supported their child.

We conclude that the evidence contained in the record supports the trial court's findings. As a result of incarceration, neither parent has maintained regular contact or visitation with A.R.P. While in prison, Mother was denied visitation with A.R.P. by court order; however, Father was not. Nevertheless, he did not take any actions to obtain visitation with his son, and his only contact with A.R.P. while incarcerated was two birthday cards. Mother did attempt to maintain contact with A.R.P. by sending him cards, letters, toys, and tape recordings of stories; however, when she was released in April, 1999, and given an opportunity to regain regular contact with her son, she wasted that opportunity by using drugs and violating her parole, and she was re-incarcerated in July, 1999.

In the past four and one-half years of A.R.P.'s life, neither parent has established a meaningful relationship with their son. However, during the past three years, A.R.P. has established a meaningful relationship with his current foster parents, with whom he has lived since February, 1998. He is now in a stable, steady home with foster parents who wish to adopt him. During his stay with his foster parents, A.R.P. has seen both his Father and Mother, yet he considers his foster parents his family. As a result of A.R.P.'s connection with his foster parents, the trial court found that changing caretakers would have a negative effect on A.R.P., and we agree. According to the testimony of his foster mother, A.R.P. experienced increased nightmares after his two visits with Father, following the latter's release in July.

The trial court also found that the homes of Mother or Father may be inappropriate because of prior criminal activity. At the time of trial, Mother was still incarcerated and could not provide a home for her child, and Father had only been out on parole approximately eight weeks. Both parents have used drugs and alcohol in the past, and both parents have extensive criminal histories. Furthermore, both parents have been through drug treatment programs and relapsed.

Lastly, the court found that neither parent has paid support consistent with the child support guidelines. Father was incarcerated from March 1997 to July 2000, and Mother was incarcerated from August 1997, until the time of trial. During that time, both Mother and Father held jobs while in prison. Even though their income was minimal, neither parent made any effort to provide any monetary support for A.R.P.

Under these circumstances, we decline to disturb the trial court's conclusion that termination of Mother's and Father's parental rights is in the child's best interest. The trial court accurately captured the essence of this case when it said the following in its termination order:

> Although both parents appear to love their child and both parents appear to have taken advantage of the available educational opportunities in prison in an effort to turn their life around, they cannot erase their past criminal problems and substance abuse, and the damage caused by same to their relationship with their son. They have been absent physically, emotionally and financially for fifty-two (52) of the fifty-eight (58) months of their child's life. The child should not be uprooted and have his life turned upside down because his parents now claim they are ready to act like parents.

V. *Conclusion*

The judgment of the trial court is affirmed for the reasons stated. This case is remanded for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law. Costs of this appeal are taxed to the appellants, J.S. and T.P.

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CHARLES D. SUSANO, JR., JUDGE